



Commonwealth of Massachusetts

State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-93-12

FACTS:

You are an employee in the Governor's office. In this position, you report to a supervisor, on a wide range of issues pending before the Governor, and which need her review and comment. She then advises the Governor. You are involved in inter-agency coordination, and research and preparation of materials for your supervisor's review, and you are also assigned specific tasks by her.

You are also an elected municipal official in the City of ABC. This is a part-time, salaried post. You state that in your role as an employee in the Governor's Office, you intend to abstain from all matters regarding ABC.

QUESTION:

What restrictions are there on a municipal official who is also an employee in the Governor's Office?

ANSWER:

As a municipal official, you may not vote or act on any matter which is within the "purview" of the Governor's office.

DISCUSSION:

Section 4(a) generally prohibits a state employee from receiving compensation from anyone other than the state in relation to any particular matter^{1/} in which the state is a party or has a direct and substantial interest. Section 4(c) prohibits a state employee, otherwise than in the proper discharge of his official duties, from acting as agent or attorney for anyone in connection with any particular matter in which the state is a party or has a direct and substantial interest. Section 4 is based on the principle that "public officials should not in general be permitted to step out of their official roles to assist private entities or persons in their dealings with government." Perkins, *The New Federal Conflict Law*, 79 Harv. L. Rev. 1113, 1120 (1963).

However, a "municipal exemption" was adopted by the Legislature in 1980 to limit (but not entirely eliminate) the effects of §4. The Legislature enacted this exemption in St. 1980, c. 10 to mitigate a harsh application of §4, which would otherwise virtually prohibit state employees from holding municipal office in some situations. Under this exemption, a state employee may hold an elective or appointive office in a city, town or district, and §4 will not prohibit such an employee from performing the duties of, or receiving the compensation provided for, such office. Nonetheless, no such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.^{2/} G.L. c. 268A, §4. It makes no difference whether the individual, as a state employee, has any responsibility for the matter in question. *EC-COI-92-22*. The municipal exemption was enacted to permit a state employee, who holds municipal employment or a municipal office, to participate as a local official in all matters coming before him, as long as those matters are not ones over which *his state agency* has jurisdiction, or, in the words of the statute, are within its "purview." *EC-COI-92-22; 92-8; 86-2*.

As we stated in *EC-COI-92-22*, the municipal exemption's "purview" restriction serves three purposes. First, it eliminates the potential for undue state agency influence over those local officials who also happen to be the state agency's employees. For example, a state employee who also serves as a local official may be

compelled by his state agency superiors to carry out his agency's wishes concerning an important local issue, even if that policy is not in the municipality's best interests. Second, it avoids compromising state agency action where one of its own employees has pre-judged the issue at the local level. Finally, because the state employee is prohibited from participating as a local official on matters of interest to his state agency, he is protected from being placed in an awkward political and personal situation. *EC-COI-92-22*.

The critical question here, is what matters are "within the purview" of the Governor's office. The Commission has held that "purview" includes any matter which is regulated, reviewed, or supervised by the agency in question. See *EC-COI-92-22*; 86-2; 83-26; 82-89. The Constitution of Massachusetts gives the Governor broad executive powers. Mass. Const. Pt. 2, C. 2. §1. Such authority includes the ability to pardon, and to nominate and appoint judicial officers. More important, under G.L. cc. 6, 6A, and 7, the Legislature has placed executive offices, departments and agencies under the Governor's jurisdiction. A *partial* list of offices under the Governor's jurisdiction includes the Executive Office for Administration and Finance (which is composed of the Department of Revenue, the Office of the Comptroller, the Massachusetts Commission Against Discrimination, among others), the Executive Office of Communities and Development, the Executive Office of Consumer Affairs and Business Regulation, and the Executive Office of Higher Education, to name a few. See *e.g.*, *EC-COI-92-28* (reach of Governor's control extends to Executive agencies). Additionally, the Governor's purview would include all legislation since the Governor reviews and either signs or vetoes all legislation.

Thus while the conflict of interest law will not prevent you from holding both the post in the Governor's Office and the elected, paid municipal position, as a municipal employee, you may not act or vote on any matter^{3/} which involves the Executive Branch of the State Government. For example, if ABC was considering opening a landfill, you would be unable to act or vote on such matter, as it would require a permit from the Department of Environmental Protection, an agency under the Governor's purview. Similarly, you could not act or vote on the issuance of local liquor licenses, as that matter falls within the jurisdiction of the Alcoholic Beverages Control Commission, an agency under the Governor's purview. Likewise, you may not participate, as a municipal official, in drafting legislation or sponsoring legislation of interest to the City. These examples are intended to be representative only. If you are unsure in a particular situation whether the local matter is within the purview of the Governor's office, you may contact us at that time with specific facts.^{4/}

Section 4 applies less restrictively for an *unpaid* municipal employee. As an employee in the Governor's office, the municipal exemption limits your ability to act or vote on a broad range of matters. Therefore, you may wish to relinquish your municipal salary, as §4 applies less restrictively to an uncompensated municipal employee. See *EC-COI-92-25*. As stated above, §4 contains two distinct operative restrictions on a state employee's outside activities. Section 4(a) generally prohibits a state employee from receiving compensation from anyone other than the state in relation to any particular matter in which the state is a party or has a direct and substantial interest. If you are uncompensated as a municipal official, §4(a) will not restrict you at all, because you will not receive any compensation in that position.

However, §4(c) prohibits a state employee from acting as agent or attorney for anyone in connection with any particular matter in which the state is a party or has a direct and substantial interest. The language and structure of the municipal exemption indicates that the "purview" limitation of the "municipal exemption" will apply to an *unpaid* municipal official *only* in the narrow circumstances when he acts as agent for a municipal agency or municipality. Thus, if you are unpaid in your municipal post, the general prohibitions of §4 will restrict you only to the extent that you act as an agent^{5/} for the municipality or a municipal agency. Where you act as an agent, you will need the "municipal exemption," and the "purview" limitation of the municipal exemption would apply. For example, you would be unable to lobby the Legislature on behalf of the municipality, as you would be acting as an agent in connection with a matter under the Governor's purview. However, if you are unpaid, you may fully participate in any municipal business in which you are not acting as an agent for the municipality or a municipal agency in connection with a matter within the purview of the Governor's office. *EC-COI-92-25*.

Date Authorized: April 27, 1993

^{1/}"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the

general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

²“Official responsibility,” the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

³Because the Legislature did not specifically use the term “particular matter” in the municipal exemption, the intent was to incorporate a broader class of items. For example, “matter” applies to legislative or managerial actions such as the adoption of a budget, which is not a “particular matter.” *Graham v. McGrail*, 370 Mass. 133, 139 (1976).

⁴Normally, a state employee who holds a municipal post will also have issues under §6 (which prohibits a state employee from participating in particular matters in which a business organization in which he is serving as an employee has a financial interest), as a municipality is considered a business organization. *EC-COI-92-03*. However, as a state employee, you have voluntarily agreed to abstain in all matters concerning ABC. Therefore, §6 is not implicated.

⁵The Commission has held that in general, a public employee acts as agent for the purpose of G.L. c. 268A when he speaks or acts on behalf of another in a representational capacity. *See, e.g., EC-COI-92-25; see also, Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992). Some examples of acting as agent are: appearing before a government agency on behalf of another, submitting an application or other document to the government for another, or serving as another’s spokesperson. *See, e.g., EC-COI-92-18, and Commission Advisory No. 13 (Agency)*.